DOCKET FILE COPY ORIGINAL

RECEIVED

OCT - 1 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
Application by BellSouth Corporation et al.	)	
for Provision of In-Region, InterLATA	)	CC Docket
Services in South Carolina	)	No. 97-208
	)	

MOTION OF AT&T CORP. AND LCI INTERNATIONAL TELECOM CORP. TO DISMISS BELLSOUTH'S 271 APPLICATION FOR SOUTH CAROLINA

Mark C. Rosenblum
Leonard J. Cali
Roy E. Hoffinger
Stephen C. Garavito
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4363

David W. Carpenter
Mark E. Haddad
Ronald S. Flagg
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Douglas W. Kinkopf
LCI INTERNATIONAL TELECOM CORP.
8180 Greensboro Drive
Suite 800
McLean, VA 22102
(703) 848-4476

Eugene D. Cohen
BAILEY CAMPBELL PLC
649 North Second Avenue
Phoenix, AZ 85003
(602) 257-8611

October 1, 1997

No. of Copies rec'd 0+1
List ABCDE

Table of Contents

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
Application by BellSouth Corporation et al.	)	
for Provision of In-Region, InterLATA	)	CC Docket
Services in South Carolina	)	No. 97-208

MOTION OF AT&T CORP. AND LCI INTERNATIONAL TELECOM CORP. TO DISMISS BELLSOUTH'S 271 APPLICATION FOR SOUTH CAROLINA

AT&T Corp. ("AT&T") and LCI International Telecom Corp. ("LCI") hereby respectfully move to dismiss immediately the application of BellSouth Corporation et al. ("BellSouth") for in-region long distance authority in South Carolina under section 271 of the Telecommunications Act of 1996 ("the Act").

INTRODUCTION AND SUMMARY OF ARGUMENT

BellSouth admits (Br. 20) that there are several "areas" -- including "pricing, combinations of unbundled network elements, and certain OSS performance measurements and standards" -- in which it is unwilling even to offer to comply with this Commission's requirements. BellSouth further concedes that it has filed this application in the hope that the Commission will "change its position" on these issues, which it characterizes as "narrow disagreements about the meaning of legislation," or overlook them in light of its alleged compliance with other requirements. Id. at 20-21.

Given these concessions of noncompliance, BellSouth's application should be summarily dismissed. The areas in which it has chosen not to comply -- UNEs, OSS,

pricing -- are not narrow but are those most crucial to the future of local competition in South Carolina. By refusing to accept its legal obligations, BellSouth is effectively delaying competitive local entry in South Carolina. For example, BellSouth's OSS witness admits that "[s]ince BellSouth is pursuing its legal disagreement with the FCC position on providing UNE combinations as a matter of law, we therefore have not yet undertaken [the] development" needed to make "our electronic interfaces . . . accommodate UNE combinations." Stacey Aff. (OSS) ¶ 60. Rather than permit the section 271 application process to prolong this footdragging, the Commission should act expeditiously to dismiss the application.

Two defects, in particular, are conceded in the application and are plain on the face of BellSouth's Statement of Generally Available Terms and Conditions ("SGAT"). The Commission therefore need not establish new law, or resolve disputed facts, to deny BellSouth's application on either of these independent grounds. First, BellSouth refuses to offer potential competitors access to combinations of unbundled elements ("UNEs") as they are currently combined in BellSouth's network. Instead, BellSouth offers access only to physically separated elements that competitors must recombine. Second, BellSouth refuses to offer for resale the individual contract service arrangements ("CSAs") that it is increasingly using to lock up large customers, and that the Commission's rules expressly require BOCs to make available at a discount to competitors.

There are many other defects in BellSouth's application, and if the Commission so requires, AT&T and LCI will provide the Commission with a full accounting in the normal course. But AT&T and LCI urge the Commission to act expeditiously and

dismiss the application outright as soon as practicable and before such comments are due, for several reasons.

First, and most important, every day that BellSouth's application pends before this Commission is another day that BellSouth will persist in refusing to make UNE combinations and CSAs available to competitors. This is particularly problematic with respect to UNE combinations, because competitors cannot work through with BellSouth the myriad implementation issues that must be resolved to make UNE combinations a commercially viable means of offering service until BellSouth accepts the necessity of offering such combinations. To wait 90 days to deny the application is thus to delay the prospects for meaningful competition for yet another 90 days.

Second, for the Commission and Department of Justice ("DOJ") to prepare comprehensive analyses of a 17,000-page section 271 filing requires the commitment of enormous volumes of resources. When an application is deficient on its face, it is a waste of the Commission's and DOJ's resources (as well as those of other commenting parties) to litigate every point.[1]

Finally, dismissal of this action will reinforce the basic rule this Commission has established in the Ameritech applications to date, which is that serious applications that genuinely attempt to meet each of the Act's requirements will be given plenary consideration by this Commission, while applications that are facially defective will be summarily dismissed. In particular, now that the Commission has set forth the requirements for section

[1] Moreover, as described in greater detail below, BellSouth's SGATs for other states contain the same facial defects as does the South Carolina SGAT.

271 in detail, not only in the Local Competition Order and Ameritech Michigan Order but in the SBC Oklahoma Order and others as well, there is no reason for any BOC to present an application that is not, at a minimum, facially compliant with all legal requirements.

ARGUMENT

BellSouth has brought its application under section 271(c)(1)(B), often referred to as "Track B." Even assuming that BellSouth could properly file a section 271 application for South Carolina under Track B, it has failed to demonstrate compliance with "each" of the items on the competitive checklist. § 271(d)(3)(A)(ii). In particular, BellSouth fails to offer both "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" and "telecommunications services . . . for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)." § 271(c)(2)(B)(ii), (xiv). Thus, the Commission can put aside the question whether BellSouth has proven that it can fulfill its "paper promises" to provide all checklist items in competitively significant volumes and on reasonable and nondiscriminatory terms and conditions (see Ameritech Michigan Order ¶ 55[2]), because the promises themselves are facially insufficient.

I. EXPEDITED DISPOSITION OF BELLSOUTH'S APPLICATION IS APPROPRIATE.

As shown in parts II and III below, the Commission need not resolve any factual disputes or establish any new legal standards to resolve this motion. BellSouth insists

---

[2] Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (rel. Aug. 19, 1997).

on breaking apart its network elements and forcing CLECs to recombine them in violation of the statute and of clear Commission regulations and orders. In addition, BellSouth refuses to offer wholesale discounts on CSAs, and refuses to permit any resale whatsoever of services provided under CSAs other than to the original customer, again in violation of the statute and clear Commission regulations and orders.

Section 271 places on the applicant the burden of proving that all of the requirements for authorization to provide in-region, interLATA services are satisfied. Ameritech Michigan Order, ¶ 43. The Commission, in turn, has made it clear that a BOC's application must, on its face, comply with all statutory requirements: "In the first instance, therefore, a BOC must present a *prima facie* case in its application that all of the requirements of section 271 have been satisfied." Id. ¶ 44 (emphasis added). The Commission also has made clear to all section 271 applicants that "[w]e therefore expect that, when a BOC files its application, it is already in full compliance with the requirements of section 271 . . . ." Id. ¶ 55.

BellSouth's application violates these rules. For the reasons described below, BellSouth has not made a *prima facie* case that "all of the requirements of section 271 have been satisfied." Id. ¶ 44. To the contrary, BellSouth concededly refuses to meet all of the requirements, including critical checklist obligations. As the Commission made clear in its summary disposition of Ameritech's initial section 271 application, where a section 271

application contains facial defects, the Commission will not proceed with plenary review until the defects are remedied.[3]

In addition to enforcing these procedural rules and following precedent clearly laid out by the Commission over the past year, there are at least four other reasons why immediate disposition of this motion to dismiss is appropriate.

First, resolution of the motion does not involve articulation of new legal principles or any fact-finding on the part of the Commission. Rather, as described below, dismissal of BellSouth's application is mandated by straight-forward application of the Commission's regulations to the face of BellSouth's SGAT. In other words, the defects in the SGAT are patent on its face.

Second, immediate dismissal of BellSouth's application, rather than denial in 90 days, is appropriate to avoid the needless waste of resources of the Commission and DOJ (and other parties) in this docket. Where BellSouth has chosen to file an application that, on its face, violates Commission regulations that are in full force and effect, it makes no sense to require the Commission, its Staff and DOJ to devote literally thousands of hours to plenary analysis of the application. In light of the Commission's issuance of its over 200-page Ameritech Michigan Order, there clearly is no need for the Commission to issue a detailed or delayed order in response to BellSouth's facially defective application. To the

[3] See Application by Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to provide In-Region, Inter-LATA Services in Michigan, CC Docket No. 97-1, Order, 12 FCC Rcd 2088 (Com. Car. Bur. Rel Feb. 12, 1997).

contrary, prompt action by the Commission will provide badly needed guidance to BellSouth as to the Act's threshold requirements.[4]

Third, any delay in responding to this patently inadequate filing might be perceived by other BOCs as reason to waver in their own efforts at compliance with the Act. By contrast, decisive and expeditious action will confirm that the Commission means what it has said, and therefore will encourage the filing of serious applications.

Fourth, and most fundamentally, immediate resolution of the issues raised in this motion will prevent BellSouth from continuing to forestall competition by denying competitors access to UNE combinations and to resale of CSAs. In particular, the UNE-based entry that AT&T and LCI seek to pursue cannot begin until BellSouth is compelled to drop its longstanding and unlawful resistance to meeting its obligations under the Act. As BellSouth admits in its application, it is unwilling even to begin the OSS "development" work needed "to accommodate UNE combinations" because it is "pursuing its legal disagreement with the FCC position." Stacey Aff. (OSS) ¶ 60. Given the glaring defects in BellSouth's SGAT, it makes no sense to indulge BellSouth's continuing efforts to block competition for yet another 90 days.

---

[4] BellSouth has announced that it plans to file a section 271 application for Louisiana in mid-October, and for as many as six other states by year-end, i.e., likely during the 90 day period when BellSouth's South Carolina application would be pending if permitted to run its full course. See "BellSouth Cites OSS As Possible Barrier To Section 271 Approval," Washington Telecom Newswire (September 11, 1997). As described below, BellSouth's SGATs in Louisiana and in other states contain comparable UNE and resale restrictions. See infra notes 8, 13.

II. BELLSOUTH'S APPLICATION MUST BE DISMISSED BECAUSE ITS SGAT FAILS TO OFFER CLECS, AT COST-BASED RATES, COMBINATIONS OF UNBUNDLED NETWORK ELEMENTS THAT BELLSOUTH CURRENTLY COMBINES IN ITS OWN NETWORK.

A. The Commission Repeatedly Has Made Clear That Incumbent LECs Must Provide UNE Combinations That They Currently Combine In Their Own Networks At Cost-Based Rates.

The Commission has underscored repeatedly that it is vital to competition for incumbent LECs to make combinations of UNEs that are currently combined in their own networks available to competitors at cost-based rates. In the Ameritech Michigan Order, the Commission stated that "the ability of new entrants to use . . . combinations of unbundled network elements is integral to achieving Congress' objective of promoting competition in the local telecommunications market." Ameritech Michigan Order, ¶ 332. The Commission also "determined that . . . limitations on access to combinations of unbundled network elements would seriously inhibit the ability of potential competitors to enter local telecommunications markets through the use of unbundled elements, and would therefore significantly impede the development of local exchange competition." Id. ¶ 333. In the Access Charge Reform Order, the Commission premised its decision to adopt a "market-based approach to reducing interstate access charges" substantially on its expectation that new competitors would be able "to lease an incumbent LEC's unbundled network elements at cost.[5] Thus, as Chairman Hundt recently stated, the Commission has "highlight[ed] the

[5] Access Charge Reform, et al., CC Docket No. 96-262, First Report and Order, ¶¶ 32, 44 (FCC 97-158, rel. May 16, 1997).

importance we place on incumbents making available to new entrants their network elements on a combined basis -- a combination sometimes referred to as the UNE platform."[6]

The Commission's rulings and regulations governing provision of existing UNE combinations at cost follow directly from the Act's requirements. The Act requires incumbent LECs to provide competitors "nondiscriminatory access to network elements," and to do so "in a manner that allows requesting carriers to combine such elements in order to provide . . . telecommunications service" and at a price based "on the cost" of providing the elements. §§ 251(c)(3), 252(d)(1)(A)(i). Consistent with the Act, the Commission's rules require not only that combinations of network elements be provided at cost-based rates (see 47 C.F.R. § 51.307(a)), but that incumbents "not separate requested network elements that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). This latter provision "bars incumbent LECs from separating [network] elements that are ordered in combination."[7]

In its decision reviewing the Local Competition Order, the Eighth Circuit affirmed these rules. In particular, the Eighth Circuit affirmed that BellSouth and other incumbent ILECs have a duty to provide CLECs with combinations of "all of the unbundled elements" at "cost-based rates under unbundled access as opposed to wholesale rates under resale," even when those elements are used "to provide local telecommunications services."

---

[6] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Third Order on Reconsideration, FCC 97-295, (rel. August 18, 1997) ("Local Competition - Third Order on Reconsideration") (Separate Statement of Chairman Hundt).

[7] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order ¶ 293 FCC 96-325 (rel.August 8, 1996) ("Local Competition Order").

Iowa Utilities Bd., 120 F.3d at 815. The Eighth Circuit also affirmed the Commission's rule that incumbent LECs may not separate elements currently combined in their own network (47 C.F.R. § 51.315(b)), and vacated only those provisions (subsections 51.315(c)-(f)) that would have obligated incumbent LECs to combine elements in a manner in which they were not "ordinarily combined" in their networks. See Iowa Utilities Bd., 120 F.3d at 818 n.38.

Since the Eighth Circuit's decision, the Commission has reaffirmed that "incumbent LECs may not separate" elements that are "currently combined":

> Although we conclude that shared transport is physically severable from switching, incumbent LECs may not unbundle switching and transport facilities that are already combined, except upon request by a requesting carrier. Although the Eighth Circuit struck down the Commission's rule that required incumbent LECs to rebundle separate network elements, the court nevertheless stated that it: 'upheld the remaining unbundling rules as reasonable constructions of the Act, because, as we have shown, the Act itself calls for the rapid introduction of competition into the local phone markets by requiring incumbent LECs to make their networks available to . . . competing carriers.' . . . Therefore, although incumbent LECs are not required to combine transport and switching facilities to the extent that those elements are not already combined, incumbent LECs may not separate such facilities that are currently combined, absent an affirmative request.

Local Competition - Third Order on Reconsideration, ¶ 44 (emphasis supplied; citation omitted). The Commission then reaffirmed this rule in its Ameritech Michigan Order: "We emphasize that, under our rules, when a competing carrier seeks to purchase a combination of network elements, an incumbent LEC may not separate network elements that the incumbent LEC currently combines." Id. ¶ 336.

B. BellSouth's SGAT Is Unlawful Because It Fails To Provide CLECS Access To Combinations Of UNEs At Cost-Based Rates As They Are Currently Combined In BellSouth Own Network.

BellSouth admits that it does not comply with this Commission's rules and orders on UNE-combinations. In its view, "[t]o impose under section 271 any requirement that BellSouth must offer UNEs on a pre-combined basis or as a "platform" would contravene the Court of Appeals' decision and violate section 271(d)(4), which forbids the Commission to expand the requirements of the competitive checklist." BellSouth Br. 29. "Therefore," BellSouth explains, "if a CLEC wishes to obtain an existing retail service from BellSouth on a pre-combined, "switch-as-is" basis, BellSouth will provide this service at the retail rate less the 14.8 percent resale discount set by the SCPSC." Id. at 39.

BellSouth's South Carolina SGAT reflects this position.[8] The SGAT does not include any provisions that offer access to combinations of network elements as they are currently combined in BellSouth's network, and BellSouth has not offered to make even CLEC-combined elements available at cost-based rates.[9] The relevant provision regarding combinations is expressly limited to "CLEC-Combined Network Elements" (emphasis supplied), and reads as follows:

"F. CLEC-Combined Network Elements

---

[8] BellSouth's SGATs in other states contain identical restrictions. See Louisiana SGAT § II.F.1; Mississippi SGAT § II.F.1; Alabama SGAT II.F.1.

[9] BellSouth actually has advised the Florida Public Service Commission that it should ignore the Commission's Ameritech Michigan Order because it is "just another attempt by the FCC to usurp [the PSC's] authority, sidestep the Telecom Act, and circumvent the ruling of the Eighth Circuit Court of Appeals." Testimony of Alphonso Varner, Fla. PSC Docket No. 960786-TL, at 284 (Sept. 2, 1997).

> 1. CLEC Combination of Network Elements. CLECs may combine BellSouth network elements in any manner to provide telecommunications services. BellSouth will physically deliver unbundled network elements where reasonably possible, e.g., unbundled loops to CLEC collocation spaces, as part of the network element offering at no additional charge. Additional services desired by CLECs to assist in their combining or operating BellSouth unbundled network elements are available as negotiated."

This offer is defective on its face. It is carefully tailored to offer access only to physically separated elements that CLECs must take steps to combine, not to combinations of elements that are "already combined" in BellSouth's network. Refusing to comply with the Commission's regulation mandating that it "not separate requested network elements that the incumbent LEC currently combines" (47 C.F.R. § 51.315(b)), BellSouth's SGAT calls for BellSouth to "physically deliver" UNEs "to CLEC collocation spaces." SGAT § II.F.1. As BellSouth has admitted in testimony before state commissions, this means that BellSouth will first "take[] apart" existing loop/port combinations and then require CLECs to "reconnect them" in their own "collocation spaces."[10] By separating network elements that are already combined in its network and thereby imposing unnecessary costs and delay upon CLECs, BellSouth's SGAT violates not only the Commission's rule on the non-severability of network elements but also the Act's requirement that CLECs provide access to network elements on "rates, terms, and conditions that are that are just, reasonable, and nondiscriminatory." § 251(c)(3) (emphasis added); see 271(c)(2)B)(ii).

---

[10] Testimony of Robert Scheye, BellSouth, Fla. PSC Docket No. 960786-TL, at 622 (Sept. 2, 1997); see id. at 622-29 (attached hereto as Exhibit A); see also Testimony of Alphonso Varner, BellSouth, Fla. PSC Docket No. 960786-TL, at 348 (Sept. 2, 1997) ("We won't combine them [unbundled elements] for you. We will terminate them in your collocation space and you can combine them yourself.") (attached hereto as Exhibit B).

The Commission has already rejected each of the grounds on which BellSouth seeks to justify its position on UNE-combinations. First, as noted above, the Commission has already rejected arguments that the Eighth Circuit's decision precludes the Commission from requiring incumbent LECs to provide existing combinations of network elements or to refrain from separating elements. See page 10, supra.

Second, the Commission has rejected the assertion (BellSouth Br. 37-40) that the decision whether to apply wholesale, rather than cost-based, rates to UNE combinations which duplicate existing BellSouth retail service is nothing more than a pricing issue within the "exclusive jurisdiction" of the SCPSC. To begin with, the Act unambiguously mandates that UNEs be priced at cost-based rates (§ 252(d)(1)(A)(i) and that resale services be priced at wholesale rates (§ 252(d)(3)) -- a distinction that the Eighth Circuit explicitly recognized. See Iowa Utilities Bd., 120 F.3d at 815 ("a competing carrier may obtain the capability of providing local telephone service at cost-based rates under unbundled access as opposed to wholesale rates under resale"). A state commission has no more authority to ignore the Act's plain language than would the Commission or any court.

But in any event, even if the choice of cost-based versus wholesale rates could properly be viewed as a "pricing" issue, this Commission has already made clear that it has jurisdiction, in the context of a section 271 application, to determine whether the Act's cost-based pricing requirements for UNEs, including UNE combinations, have been met. The Act requires the Commission to adjudicate whether UNEs are provided "in accordance with the requirements of sections 251(c)(3) and 252(d)(1)" (§ 271(c)(2)(B)(ii)), and the Commission therefore cannot defer to a state's determinations. The Commission thus

emphatically held in its Ameritech Michigan Order that "a BOC cannot be deemed in compliance with . . . the competitive checklist unless the BOC demonstrates that prices for . . . unbundled network elements . . . are based on forward-looking economic costs." Id. ¶ 289; see id. at ¶¶ 285-97. This holding is controlling here.

Chairman Hundt recently stated that "[w]here the purpose or effect of moves by an incumbent LEC to break apart currently combined elements is to create a barrier to competition, we will take action to tear down or prevent the erection of such barriers." Local Competition - Third Order on Reconsideration (separate statement of Chairman Hundt). BellSouth's SGAT is a case study in how some BOCs today are seeking to "break apart" network elements and to refuse to price them as the Act requires. To begin to "tear down" the barriers erected by BellSouth, the Commission should deny BellSouth's section 271 application immediately.

III. BELLSOUTH'S APPLICATION SHOULD BE DISMISSED ALSO BECAUSE THE SGAT DOES NOT OFFER CONTRACT SERVICE ARRANGEMENTS AT WHOLESALE RATES, OR FOR RESALE TO OTHER CUSTOMERS

By imposing an express duty upon LEC's "to offer for resale at wholesale rates any telecommunications service that [it] provides at retail," section 251(c)(4)(A) makes clear that no category of telecommunications services is exempt from the Act's resale pricing requirements. In addition, section 251(c)(4)(B) imposes on BellSouth an obligation "not to impose unreasonable or discriminatory conditions or limitations on, the resale of such telecommunications service." § 251(c)(4)(B). BellSouth's SGAT violates both of these duties by restricting the availability of contract service arrangements ("CSAs").

Consistent with the broad terms of the Act, the Commission previously and emphatically rejected BellSouth's plea for a rule "prohibiting resale of contract service arrangements"[11]:

> "[The] language [in Section 251(c)(4)] makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings. We therefore conclude that no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs. A contrary result would permit incumbent LECs to avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act.

Local Competition Order ¶ 948 (emphasis supplied).[12] The Commission also rejected BOC "arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts" and concluded that "[i]f a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service." Local Competition Order ¶ 951. The Commission's rules therefore prohibit incumbent LECs from imposing resale restrictions except for certain enumerated exceptions that do not include CSAs (see 47 CFR § 51.613). In Iowa Utilities Bd., 1997 WL at *31, the Eighth Circuit

---

[11] Comments of BellSouth filed in Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98, at 66 (May 16, 1996); see also Reply Comments [of BellSouth] at 44-45 (May 30, 1996) (same).

[12] The services BellSouth offers through CSAs are telecommunications services within the meaning of § 153(46) of the Act and are "provide[d] at retail to subscribers who are not telecommunications carriers," and are thus unquestionably subject to the resale requirement of § 251(c)(4)(A). For example, BellSouth's CSA with General Electric includes basic business service, ISDN business services, and MegaLink services. See Customized Telecommunications Service (CTS) Agreement, BellSouth and General Electric, Tariff 97-13 (SC PSC). BellSouth's agreement with NationsBank includes basic business services and PBX trunks. See CTS Agreement, BellSouth and NationsBank, Tariff 97-110 (SC PSC, filed March 18, 1997).

affirmed these rules, holding that "the FCC has jurisdiction to issue these particular rules and . . . its determinations are reasonable interpretations of the Act," and expressly rejecting the BOCs' objections "to the FCC's determination that discounted and promotional offerings are 'telecommunication service[s]' that are subject to the resale requirement of subsection 251(c)(4)."

Nevertheless, in flat violation of the Act, the Commission's rules, and the Eighth Circuit's decision, BellSouth refuses to make its "contract service arrangements available at a "wholesale discount . . . ." BellSouth Br. 53. BellSouth's SGAT also states that CSAs are not available at a wholesale discount:

> "B. Discounts. Retail services are available at discounts as ordered by the Commission. . . . Discounts apply to intrastate tariffed service prices except that these discounts do not apply to the following services:
>
> > 1. Contract Service Arrangements. BellSouth's contract service arrangements are available for resale only at the same rates, terms and conditions offered to BellSouth end users."[13]

To justify its exemption for CSAs, BellSouth simply advanced the same arguments previously rejected by this Commission. For example, in its brief in connection with the AT&T/BellSouth arbitration in South Carolina, BellSouth argued that "[n]o resale discount should apply since the contract price has already been discounted from the tariffed rate to meet competition." Brief and Proposed Order of BellSouth Telecommunications Inc.,

---

[13] SGAT § XIV.B (emphasis supplied). Once again, the unlawful terms of BellSouth's SGAT are not limited to South Carolina. Essentially identical provisions are found in BellSouth's SGAT in nearly every state in its region. See, e.g., Louisiana SGAT § XIV.B.1 (wholesale discounts not available on CSAs entered into after 1/28/97); Georgia SGAT § XIV.B.1 (identical to South Carolina SGAT); Mississippi SGAT § XIV.B.1 (wholesale discounts not available on CSAs entered after 3/10/97).

SCPSC Docket No. 96-358-C, at 6 (February 18, 1997) (emphasis added).[14] In its order, the SCPSC adopted that argument:

> "The Act indeed permits reasonable and non-discriminatory conditions or limitations on the resale of telecommunications services, and we therefore condition our ruling with respect to the CSAs. CSAs are designed to respond to specific competitive challenges on [a] customer-by-customer basis. As BellSouth argued, the contract price for these services has already been discounted from the tariffed rate in order to meet competition."

SCPSC Order No. 97-189 at 4-5 (March 10, 1997) (emphasis added). These purported justifications are irreconcilable with the Act and the Commission's rules, which make clear that Section 251(c)(4) "makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings." Local Competition Order ¶ 948; see 47 CFR §§ 51.605, 51.613.

BellSouth's resale offer is unlawful also for a second, independent reason. It fails to offer to provide CSAs for resale to customers other than the one for whom the CSA was originally developed. Indeed, BellSouth has made clear its intent to "restrict the resale [of CSAs] to the existing customer under the contract at the applicable contract rate." Brief and Proposed Order of BellSouth Telecommunications Inc., SCPSC Docket No. 96-358-C, at 6 (February 18, 1997) (emphasis added).[15] BellSouth itself operates under no such

---

[14] BellSouth did not offer any evidence to the SCPSC, nor does its Section 271 application contain any evidence, that there would be no avoidable costs associated with resold CSAs. See Cochran Aff. ¶ 31.

[15] AT&T raised its concern that "BellSouth's SGAT allows CLECs to resell service under CSAs only to the specific customer covered by the CSA" in its letter identifying disputed section 271 issues from Kenneth McNeely of AT&T to Caroline N. Watson of BellSouth, dated September 25, 1997. BellSouth has not indicated to AT&T that it has changed its position.

restriction. That is, if BellSouth wishes to offer the same terms and conditions contained in a CSA to another end user today, it is free to do so. BellSouth's refusal to permit CLECs to resell service offered under a CSA to any customer other than BellSouth's existing customer is therefore a patently "discriminatory condition[]" on the resale of telecommunications services. § 251(c)(4)(B).

The restrictions in BellSouth's SGAT on the resale of CSAs are thus facially unlawful. Competitors not only cannot market CSAs to groups of end-user customers who, in the aggregate, could meet the terms of a particular CSA, they cannot market CSAs to new customers who could independently qualify. Moreover, as a practical matter, competitors cannot use CSAs to compete for existing CSA customers, not only because of the lack of any wholesale discount but because of the cancellation penalties that often apply.[16] BellSouth can thus use CSAs to insulate a substantial portion of its market from resale competiton. Its accelerated use of CSAs -- it has already filed more than twice as many CSAs in 1997 (141) as it did in 1996 (66) -- confirms its intention to do just that. See Hayne Aff. ¶ 3 (Exhibit C). BellSouth's stark noncompliance with its statutory duties is blatantly anticompetitive and independently merits immediate dismissal of its application.

[16] BellSouth's CSAs ofter include term commitments with substantial cancellation penalties. For example, BellSouth's agreement with NationsBank, which runs for three years, includes termination penalties of at least $3 million for the first year and at least $2 million for the second year.

CONCLUSION

For the foregoing reasons, the Commission should enter an order dismissing BellSouth's section 271 application for South Carolina.

Respectfully submitted,

Mark C. Rosenblum
Leonard J. Cali
Roy E. Hoffinger
Stephen C. Garavito
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4363

Douglas W. Kinkopf
LCI INTERNATIONAL TELECOM CORP.
8180 Greensboro Drive
Suite 800
McLean, VA 22102
(703) 848-4476

Eugene D. Cohen
BAILEY CAMPBELL PLC
649 North Second Avenue
Phoenix, AZ 85003
(602) 257-8611

David W. Carpenter
Mark E. Haddad
Ronald S. Flagg
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

A

BEFORE THE
FLORIDA PUBLIC SERVICE COMMISSION

In re: Consideration of BellSouth Telecommunications, Inc.'s entry into interLATA services pursuant to Section 271 of the Federal Telecommunications Act of 1996.	DOCKET NO. 960786-TL

FIRST DAY - AFTERNOON SESSION

VOLUME V

PAGE 568 through 664

PROCEEDINGS:	HEARING
BEFORE:	CHAIRMAN JULIA L. JOHNSON COMMISSIONER J. TERRY DEASON COMMISSIONER SUSAN F. CLARK COMMISSIONER DIANE K. KIESLING COMMISSIONER JOE GARCIA
DATE:	Monday, September 2, 1997
TIME:	Commenced at 3:00 p.m.
PLACE:	Betty Easley Conference Center Room 148 4075 Esplanade Way Tallahassee, Florida
REPORTED BY:	NANCY S. METZKE, RPR, CCR

APPEARANCES:

(As heretofore noted.)

INDEX

ask for the portion of the loop, the feeder cable that hooks from the distribution loop into the switch?

A Well, I guess you would have to go by carrier. AT&T indicated interest in neither distribution nor feeder. MCI indicated an interest in only distribution.

Q Mr. Scheye, there were a lot of questions asked about BellSouth's position with respect to reconnection of unbundled elements. I think I understand what you said and what Mr. Varner said with respect to the glue charge, but I think there was one question I haven't heard asked, and that is this: If, in fact, you were serving a customer today and AT&T comes to you and wants to serve that customer using unbundled network elements and AT&T asks to use the loop and the port that you already have connected to that customer, are you going to disconnect the loop and port and require AT&T to reconnect it?

A If that's all that AT&T, or the carrier requested, yes, because at that point we would provide the loop and we would provide the port, and AT&T, or whoever the CLEC is in that case, would reconnect them; so they would have to be -- if they happened to be the same ones connected, they would have to be taken apart.

Q Well, excuse me a minute. Okay, so then your answer is that you will have to take those apart and then AT&T will then have to figure out a way to reconnect them;